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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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HONORABLE MANUEL L. REAL,
JUDGE PRESIDING

- - -

MICHAEL ANTHONY JACKSON, Petitioner, vs. ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	)	No. CV 91-4249-R

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, November 21, 1995

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INDEX

PROCEEDINGS	Page
Petitioner's motion to expand the record	6
Petitioner's motion to exclude testimony of Respondent's experts or for leave to take their depositions at the expense of Respondent	18
Pretrial Conference	20

LOS ANGELES, CALIFORNIA; TUESDAY, NOVEMBER 21, 1995; 9:30 AM

(Proceedings in unrelated matter held.)

THE CLERK: Item Number 2, CV 91-4249, Michael Jackson vs. Arthur Calderon, Warden.

Counsel, your appearances, please.

MR. KREPS: Good morning, your Honor. Allyn Kreps, Rex Hungerford and Russell Weis of Lewis, D'Amato, Brisbois & Bisgaard for the petitioner.

And, your Honor, this morning we have filed a notice of association of counsel of O'Melveny & Myers by Robert S. Draper, who is here in the courtroom. And they are being associated as strictly pro bono of counsel, without fee as part of their legal services, to assist us because of the complexity of the issues raised under Herrera and because of the apparent disagreement between the State and petitioner as to the scope of this evidentiary hearing, which is personified by the listing of fifty-two live witnesses by the State of California to be called on December 12th.

And, with the Court's permission, we would appreciate the help of Mr. Draper and O'Melveny & Myers, your Honor.

THE COURT: I have no problem with that as long as Mr. Draper understands that you're not going to get paid. And I always thought Mr. Kreps could probably handle it on his own, but I guess he has now admitted that he can't.

MR. KREPS: I've never been able to handle anything on my own, your Honor, and I always take all the help I can get, and if it's from O'Melveny & Myers--

THE COURT: [illegible] free.

MR. KREPS: --even better. And free, even better. But it's not me that is the concern, your Honor. It's the petitioner, who has been unconstitutionally convicted of first degree murder, that is at stake here.

THE COURT: Okay.

MR. de NICOLA: Good morning, your Honor. I'm Donald de Nicola, Deputy Attorney General for respondent. And with me are Deputy Attorney General Sonja Berndt and Deputy Attorney General Richard Moskowitz.

THE COURT: All right, the motion to expand the record, Mr. Kreps.

MR. KREPS: Yes, your Honor.

There are two motions before the Court as well as the pretrial conference. One is the motion to expand the record, and the other is the motion with respect to the State's designation of expert witnesses. It may make more sense, but obviously we will fall to the desire of the Court, to have the pretrial conference first so that we can determine what the issues are that are going to be tried at the evidentiary hearing on December 12th, to put the other two motions into the proper context of the evidentiary hearing rather than as simple motions to expand the record and discovery. But whatever the Court prefers obviously we'll proceed in that order.

THE COURT: Well, I think we'll talk about the issues, because I think your evidence is addressed to the hearing itself and to the matter of what is, as I understand it, at least already part of your petition. And so we can resolve that matter, which might help in terms of the extent of the hearing also. So we'll take up that first, I think, Mr. Kreps.

MR. KREPS: To expand the record first?

THE COURT: Yes.

MR. KREPS: All right. With the Court's permission, your Honor, I'd ask Mr. Weiss to argue that motion.

THE COURT: All right.

MR. WEISS: Unless the Court has any questions regarding the motion, I only have--petitioner's counsel only has two additional points in reply to respondent's opposition to the motion. And the first one deals with Claim I, and that deals with the definition of new

evidence, which was defined in Schlup v. Delo, United States Supreme Court case in 1995. I have an extra copy, if the Court desires a copy. And in Schlup the U.S. Supreme Court defines new evidence as any evidence which was not presented at trial. And ss to the declarations in support of Claim I, each declaration contains new evidence which was not presented at trial.

As to Claim III, the only additional point deals with relevance, and each and every declaration--

THE COURT: Well, each of the declarations and the evidence which is presented in those declarations by and large, Mr. Weiss, is hearsay, which would not be admissible in that respect. If admissible at all, it would be admissible only as it was treated by or considered by the experts who might testify in the trial.

MR. WEISS: Well, my understanding of the reading of Rule 7 regarding habeas corpus cases under Section 2254, Federal 28, is that Rule 7's purposes--although there may be hearsay in the declarations because it's not live testimony, and although there may be other evidentiary problems, it's in order to prevent to put all this evidence in front of the Court, which could take a lot of time.

THE COURT: Well, the question is, in the analysis of that, the Court makes the determination as to whether or not it's hearsay. In other words, the fact it's by declaration doesn't make it hearsay. The question is in the documents themselves there is so much hearsay that it can be considered only as considered by an expert with reference to that, because I think the Supreme Court has also talked about the question, and certainly it is clear that, quote, guilt or innocence, as such, is not an element of a habeas corpus petition. Here the question is any constitutional deprivation during the trial or the deprivation in terms of the actions of the lawyers and the question as to whether or not the lawyers were competent as to what was known to them at that time. We can't bring new people in and say, well, he or she should have, should have known.

MR. WEISS: Well, as to Claim III, petitioner's arguments regarding all these declarations is that all these witnesses were available and could have testified, should have testified and would have testified live. I believe most of the declarations, one of the paragraphs is, "If I was asked to testify, would have and could have."

And as to hearsay I think a lot of--

THE COURT: The question is, you know, was the lawyer made aware of it. That's the question first. That's the foundational question first, and then the declarations might be used by the Court in terms of if they were available and he was told about them, what he was told about them. And if that squares with the declarations, then it could be considered in the hearing, but not just clearly this is what we would have said if we had been around and called. That's my understanding of the law, at least.

MR. WEISS: Well, in the deposition of Mr. Klump, trial counsel, he made clear that there were certain witnesses that he didn't interview or didn't have the investigator interview, and both these declarations that we offer to expand the record are relevant on the prejudice factor, if he would have interviewed, what information could have been received.

And as far as establishing the cause factor of the Strickland test, ineffective assistance of counsel, that's going to be proved by excerpts from Klump's deposition and/or if he's live at the evidentiary hearing and from our expert Leslie Abramson.

And then the additional motions to expand the record will help show the prejudice that resulted from his failure to include these witnesses or, if he did include some of these witnesses, to adequately bring out their testimony.

THE COURT: Well, how can the Court make a determination of the truth of the declarations unless they are here live, particularly if they're saying this is what we saw or this is what we know? How do we make a determination of credibility?

I just had a nice experience with the Ninth Circuit that said I couldn't read the transcript to determine credibility; I had to see the witnesses, even though the transcript and the declarations were not inconsistent with each other.

MR. WEISS: I understand the dilemma. I guess I don't have a full answer for you. I think in my head there's a tradeoff between--

THE COURT: I think since the beginning of the court system judges have been able to rely upon transcripts of court proceedings.

Mr. Kreps, you're anxious to get into it.

MR. KREPS: Just not anxious, your Honor, but I find it necessary.

My understanding of the declarations that were filed were that they were all directed to Claim III, not to Claim I. Insofar as they were directed to Claim III, they were to be used as a foundational basis for the testimony of Miss Abramson on the--

THE COURT: In that respect--

MR. KREPS: --expert witnesses.

THE COURT: --I think they can be used. If she used them, you're going to have to lay the foundation that she, quote, first of all, used them and then depended upon them, and, thirdly, that as a result that that is what experts in the field do generally, you know, 701, 702.

MR. KREPS: And that was my understanding, your Honor. I think the Court is absolutely correct that insofar as any of the declarants are being offered for the purpose of Claim I, that we have to call them as a live witness, and I don't think there's any question on that.

And I apologize if any of the declarations were directed to Claim I. I was responsible--

THE COURT: Well, it's hard to tell.

MR. KREPS: I'm responsible for the motion, but I did not have an opportunity to personally to do it, and we would move to--

THE COURT: Well, with that understanding, I'll hear from the respondent.

MR. KREPS: Thank you, your Honor.

MR. de NICOLA: So the way I understand this is that the petitioner's receiving the declarations can't come in, as such, under Claim I.

THE COURT: For the truth of the matter. Just having to do with the question of the expert's opinion on certain things.

MR. de NICOLA: Well, it's kind of--that's, I think, hard to accept as a position because we deposed petitioner's expert Leslie Abramson, and I don't believe she saw these declarations.

THE COURT: Well, the question is they're going to have to lay some kind of a foundation for it, and we'll go from there.

MR. de NICOLA: But even if the foundation were laid, I still think that in order--if what you're really talking about is Claim III, ineffectiveness, which requires a showing of deficient performance and prejudice, that's going to require some point for the Court to make a credibility determination, about whether or not what these declarants are saying in their declarations is in fact true.

THE COURT: No, Counsel, because the question is, the question is, they're not being admitted for the truth of it, but if, for instance, if, for instance, the cross-examination of the expert is "You depended on such and such and thing, and you depended on this fact or that fact or the other fact," and you disprove that to me, then it's a question of my weighing the expert's opinion. That simple.

MR. de NICOLA: I don't--

THE COURT: That's how expert opinion is considered. It's considered on what the expert considered hearsay matters. And if there is inconsistencies or discrepancies in the hearsay, it's up to you to show that to me so that I can make the determination as to whether or not the expert opinion is worth anything.

MR. de NICOLA: Well, I think the expert opinion in that instance would be an opinion that had these witnesses been called and testified the results of the trial would have been --

THE COURT: Well, I can't make that determination until I hear the expert, as to what the expert is going to testify to, what she--I guess, in this case, what she used, and then the question of whether or not she took certain statements as true, which you say you have depositions which indicate that it isn't true.

MR. de NICOLA: Well, again, I think the difference between the type of expert we're talking about in this case and maybe the type of expert that comes up in another case is that this expert, according to her declaration, is going to be talking not only about the trial counsel's performance but also about the second prong of the Strickland test, which is the prejudice prong. That requires--and the expert has voiced opinions on the effect of the alleged ineffectiveness on the results of the case, and I think that--

THE COURT: No. The question is is she entitled to do that, and I question that very highly. I make the decision as to whether or not it's prejudicial, and I don't need an expert to help me with that. It's to help the trier of fact on fact questions, and the prejudice is a fact question.

MR. de NICOLA: Well, if that were the case, then, we would reserve still our right to challenge the veracity of these declarations.

THE COURT: Well, nobody says that you can't. I just indicated to you that that's the way you approach the expert's opinion.

MR. de NICOLA: And that they would not be admissible for the truth of the matter asserted.

THE COURT: For the truth of the matters that are asserted in the declarations.

MR. de NICOLA: A couple of things that we might suggest in that regard. I believe 28 U.S.C., Section 2246

talks about the opposing side having a right to respond to evidence submitted by declarations by counter-declarations. Would counter-declarations be--

THE COURT: I don't know what the situation is and what the counter-declarations might be. Yes, there seems to be law in habeas corpus, and articularly death penalty habeas corpus, that they can proceed by declarations, and that may be the way it happens. You know, we may be going back and forth with declarations. Some day, some judge, me, is going to have to see the people.

MR. de NICOLA: One of the declarations is from a doctor named Jackman, who doesn't report in any way to have information that he could have offered as a witness at the time of the trial. I don't see how--

THE COURT: Well, if that's the situation and Miss Abramson has relied upon that, then her expert opinion is going to be lowered somewhat, if he had nothing to offer in the first instance. The fact that the lawyer didn't talk to the doctor doesn't make it ineffective assistance of counsel, if he had nothing to offer, whether he knew it or not.

MR. de NICOLA: Well, I still think that there is a question--even if Leslie Abramson gets on the stand and says that she relied on these declarations, and if they're true--as if they were true--and it would be up for us to show whether they're true or not--that would go, I guess to the validity of her opinion.

THE COURT: Absolutely. That's what I've been saying, Counsel.

MR. de NICOLA: Okay. And so does that mean that they would not be used for the truth of the matter asserted, even on--

THE COURT: That's what I said.

MR. de NICOLA: even on Claim III in terms of showing actual prejudice, actual prejudice under Strickland or on--

THE COURT: Because all of those have to do with the question of what the lawyer knew at the time, and Miss Abramson is going to have to tell me that, what she thought the lawyer should know because of what the lawyer should have done under the circumstances that's presented.

MR. de NICOLA: But it also has to do with what the effect of that evidence would have been on the jury had it been presented and had it been countered by the prosecution. And in that sense I'm concerned that--

THE COURT: Well, I just told you the prejudice question is mine, not Miss Abramson. The prejudice question is mine.

MR. de NICOLA: And on that question it would be our position that these declarations on the prejudice question of Claim III would not be admissible for the truth of the matter asserted and it would not be up to us to refute.

THE COURT: Okay. I think that's what we've been talking about, Counsel, that they are not admissible for the truth of the matters asserted in the declarations.

MR. de NICOLA: Even on Claim III.

THE COURT: They are offered for--they're not offered on the truth of the question of prejudice; okay?

MR. de NICOLA: Very well.

THE COURT: Unless they appear here.

MR. KREPS: Your Honor, one last point.

I haven't had an opportunity to thoroughly review the declarations, and I do not anticipate that we will want to call any of the declarants in person, but we would request the right to designate them as witnesses--

THE COURT: Certainly.

MR. KREPS: --as soon as I've had a chance to do that, and I can do that by Monday, if that is satisfactory with the Court.

THE COURT: Surely.

MR. KREPS: Thank you.

MR. de NICOLA: Your Honor, if they're designated as witnesses, I think that's going to--we haven't had notice of who these people are. I think we're going need time to find out what we can do to try to--

THE COURT: Well, you were given these declarations in connection with the motion.

MR. de NICOLA: Well, we got the declarations on, I think, Thursday night, or something like that.

THE COURT: Well, okay, and you've got to December 15 to--

MR. de NICOLA: There's also--

THE COURT: --depose them, if you so desire.

MR. de NICOLA: I think there's also a question with respect to Miss Abramson, then. Since we've only gotten these declarations in the interim between the time Miss Abramson's deposition was suspended, and we reached an agreement to continue Miss Abramson's deposition on Sunday for three hours, I would like to have permission to have that deposition to go on for more than three hours, because we're going to have to ask her about eighteen declarations.

THE COURT: We don't know what the situation is or what you can do in three hours. Three hours is a long time.

MR. de NICOLA: We have a lot left over from the first deposition, and we estimated three hours without any knowledge that this new set of evidence was going to be relied upon by her in the case.

THE COURT: Well, I found that if lawyers use their time efficiently in depositions, it won't take three hours to take almost any deposition of any length; okay?

MR. KREPS: Just for the record, your Honor, they've already had Miss Abramson for eight hours.

THE COURT: All right.

Now, the motion to exclude the testimony of the respondent's experts or for leave to take their depositions at the expense of the respondent.

MR. KREPS: Your Honor, with the Court's permission, Mr. Hungerford will argue the motion.

THE COURT: All right.

MR. Hungerford: Good morning, your Honor. Just briefly in reply to the opposition to the motion.

Nowhere does the Attorney General indicate when they did finally decide to use the experts that they've finally designated, which we assumed all along was well prior to when they identified them on November 14th, which . . . .